Sitco (Stainless Ice-Tainer Corporation) *and* International Union of Electrical, Radio and Machine Workers Union, Local 1127, AFL-CIO-CLC. Case 23-CA-8624

November 12, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On June 23, 1982, Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel also filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Sitco (Stainless Ice-Tainer Corporation), San Antonio, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. In affirming the Administrative Law Judge's finding that Gloria Hernandez was discharged in violation of Sec. 8(a)(3) of Act, Member Hunter does not rely on the fact that Hernandez was replaced by an employee who had no purchasing clerk experience.

Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). That decision concerns identifying the cause of discharge where a genuine lawful and a genuine unlawful reason exist. Here he would find that the asserted lawful reason, Hernandez' unsatisfactory work performance, was not in fact relied on by Respondent but was a pretext. Since, therefore, only one genuine reason remains, the unlawful one, Member Jenkins would not apply *Wright Line*, as to do so would be confusing and misleading.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge: This case was heard in San Antonio, Texas, on May 12, 1982. The charge was filed on August 12, 1981,[1] by International Union of Electrical, Radio and Machine Workers Union, Local 1127, AFL-CIO-CLC, herein called the Union, alleging that Sitco (Stainless Ice-Tainer Corporation), herein called Respondent or the Company, violated Section 8(a)(3) and (1) of the National Labor Relations Act, herein called the Act, in the discharge of Gloria Jean Hernandez on June 25. The complaint in the matter issued on October 2 alleging not only the unlawfulness of Hernandez' discharge but also alleging independent violations of Section 8(a)(1) of the Act through two supervisors involving interrogation of Hernandez about union activities. Respondent filed a timely answer denying that it engaged in the unfair labor practices attributed to it.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Texas corporation maintaining its principal office and place of business in San Antonio, Texas, where it is engaged in the manufacture of beverage dispensers. During the 12-month period preceding issuance of the complaint Respondent, in the course and conduct of its business operations, purchased goods and commodities valued in excess of $50,000 from suppliers located outside the State of Texas, which goods and commodities were shipped directly to Respondent's San Antonio facility. The complaint alleges, Respondent by its answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

It is undisputed that the Union had been the collective-bargaining representative of Respondent's employees in a unit of production employees excluding office clerical employees beginning from about 6 months prior to the events involved in the instant case. Moreover, the Union and Respondent were parties to a collective-bargaining agreement scheduled to expire in November 1982. No history of unfair labor practices on the part of Respondent was presented at the hearing, and there was no evidence presented to establish that the relationship between Respondent and the Union was anything less than amicable.

Respondent's general manager, William C. Youngblood, testified that he himself was a lifetime member of the Teamsters Union. According to Youngblood, his philosophy with respect to union organization was that if

[1] All dates are in 1981 unless otherwise specified.

the employees had a union he supported the union 100 percent. Moreover, Youngblood related that if the clerical employees also wanted representation he would support that also. While Youngblood's assertions in the foregoing respect must be considered as completely self-serving, his assertions along with the history of Respondent's relationship with the Union provide the background against which the allegations of the complaint must be considered.

B. *The Alleged Unlawful Interrogation*

The alleged discriminatee in this case, Gloria Jean Hernandez, was originally employed by Respondent as an inventory clerk in October 1979. Her duties consisted primarily of recording inventory information on a cardex recording system. However, her duties began to change in late 1980 and early 1981 because of Respondent's phaseout of the cardex system and adoption of a computer system. Hernandez subsequently became the purchasing clerk and continued to work in the purchasing department under the supervision of Larry Metzger, then chief purchasing agent and later materials manager.

While she was not represented by the Union because of her classification as an office clerical Hernandez maintained a close association with unit employees and union officers. Thus, Hernandez testified that for about 3 or 4 months prior to her discharge on June 25 she had been dating an employee of Respondent, Carlos Gutierez, who was a union trustee. Hernandez further related in her testimony that she was a friend of Romeo Bononcini, another employee of Respondent and the president of the Union. In fact, on June 22, Hernandez had a birthday cake prepared for Bononcini which she delivered to Bononcini's office at Respondent's plant with the knowledge of Metzger.

Hernandez, who testified that she regarded Metzger as a friend as well as a supervisor, testified generally that Metzger was aware that she was dating Gutierez and associating with Bononcini and other unit members in the warehouse with whom she had contact because of her work. Hernandez related that, on several occasions between January and June "whenever there was a union meeting," Metzger asked her the next day "what went on at the union meeting yesterday?" Hernandez testified she would customarily reply that she did not know, that she did not go to the meetings—to which Metzger would generally respond, "Well, don't you talk about it," and, "You associate with Romeo and Carlos and them." To this Hernandez stated that she would reply that they did not talk about the Union. Hernandez testified that these questions would take place after union meetings but she could not recall the specific dates. Moreover, the record does not affirmatively establish when union meetings were held during the period specified by Hernandez.

Metzger, as a witness of Respondent, specifically denied ever asking Hernandez what had taken place at any union meetings. He added that he had never initiated any conversation with Hernandez about the Union or what was going on with the Union but testified that Hernandez brought the subject up to him approximately two times. Metzger, who confirmed the generally friendly relationship with Hernandez, explained on cross-examination that Hernandez had only remarked to him regarding union meetings that nobody was going to the meetings because there was a lot of drinking and arguing.

The complaint alleges, and the General Counsel argues, that Metzger's questions of Hernandez constituted interrogation in violation of Section 8(a)(1) of the Act. Respondent argues in its brief that no inquiry was made by Metzger but that even if such an inquiry was made of Hernandez it could not be considered as coercive or intimidating and in violation of the Act because it could not be viewed as calculated to "ferret out information concerning the bargaining unit employees' union activities." In this regard, Respondent points out that there was no organizational activity underway at the time, since the bargaining unit employees were already covered by a collective-bargaining agreement, and Hernandez was admittedly not engaged in organizational activities at the time. Finally, because of the relationship between Metzger and Hernandez which was described as friendly and because there was no threat of reprisal or promise of benefit contained in the remarks attributed to Metzger they must be considered as innocuous and nonviolative.[2]

While it is clear from Metzger's admissions that union meetings were discussed between him and Hernandez, I find Hernandez' testimony on the point too vague to be sufficiently reliable to establish a violation of Section 8(a)(1) by Respondent. It is not even clear that the alleged questioning took place within the 6-month period prior to the filing of the charge on which the complaint is based. It is also unlikely that Metzger would repeat his questions after each meeting once Hernandez told him, as she claimed, that she did not attend the meetings and did not talk to Bononcini and Gutierez about the Union. Finally, there is nothing in the record which would explain why Metzger's curiosity would be piqued by anything that transpired at union meetings. In this regard, it must be recalled, as Respondent's brief points out, that the production employees were already represented by the Union and already had a collective-bargaining agreement. No special dispute or concern was revealed by the record which would spark an inquiry about events at union meetings. Accordingly, under the circumstances, I credit Metzger's version of how the subject of the Union arose between himself and Hernandez and I find and conclude that the record does not establish the complaint allegation of unlawful interrogation by Metzger in violation of Section 8(a)(1) of the Act.

Another incident of interrogation was attributed to Janet Paskovich, Respondent's purchasing agent, who began her employment with Respondent around June 1. Hernandez testified that on June 17 Paskovich, prompted by the frequent paging of one Jaime Juarez over the plant intercom system, inquired of Hernandez who Juarez was. Hernandez responded that Juarez had something to do with the Union and they were having a

[2] Respondent further argues that even if Metzger's remarks could be construed as technically violative they were too insubstantial and remote to warrant a finding of a violation of Sec. 8(a)(1) citing *Skyline Mobile Homes*, 200 NLRB 109 (1972); *Wagoner Water Heater Co., Inc.*, 203 NLRB 518 (1973).

meeting up front and that was why he was being paged. Discussion then turned to the Union and Hernandez vaguely testified that Paskovich asked her "something about only the employees in the warehouse being union." Hernandez related that she told Paskovich that Bononcini had told her that the purchasing department could be included in the bargaining unit even though they did not have a union membership card. To this Paskovich allegedly asked, "You don't have to carry a card and they still can represent you?" Hernandez responded affirmatively and explained that originally when the Union was trying to form she did not like it but after she had seen what the Union could do for the people she appreciated it more and was more interested in it.

Paskovich, called as a witness by Respondent, did not deny the conversation with Hernandez as related by Hernandez. However, she placed it as occurring on the date of Hernandez' discharge, June 25. I believe Paskovich is more correct with respect to the date than Hernandez. From Hernandez' own testimony which is related in more detail below it is clear that Bononcini had made no clear representation to Hernandez about the Union's ability to represent clerical employees until June 20 or 21.

It is alleged that Paskovich's questioning of Hernandez constituted unlawful interrogation in violation of Section 8(a)(1) of the Act. While Respondent admits Paskovich's supervisory status, it urges that the simple inquiry of Hernandez who Juarez was was purely innocuous and did not amount to interrogation in violation of the Act. I agree.

I find no unlawful interrogation in the inquiries of Hernandez by Paskovich. The question by Paskovich about who Juarez was could not have been expected to elicit any relevations regarding the union activities of any employee. Since Paskovich was a relatively new employee her curiosity was reasonable as well as understandable. The ensuing remarks of Paskovich were likewise understandable and reveal no coercive interrogation of Hernandez. Hernandez was unable to specify exactly how the subject turned to the Union's ability to represent clerical employees. And Paskovich's restatement in a question form of a remark already made by Hernandez does not establish unlawful interrogation. The General Counsel has not explained how Paskovich's remarks in any way tended to interfere with, restrain, or coerce employees in their union activities. Accordingly, I find no violation of the Act in Paskovich's remarks or question to Hernandez on June 25.

C. *The Discharge of Hernandez*

1. Hernandez' union activity

As already related, the collective-bargaining unit did not include the approximately 20 office clerical employees employed by Respondent. Hernandez testified that on the morning of June 17 another office clerical employee, Diane Heinder, asked Hernandez if she had heard any rumors about forming a clerical union. Hernandez reported that she had not. Subsequently on the same day during lunchtime Hernandez inquired of another office clerical employee, Robin Williams, if she had heard any rumors regarding the starting of a clerical union. Williams replied that she had heard two drafting department employees expressing an interest in starting a union. Hernandez asked Williams if she were interested in a union and upon Williams' affirmative response Hernandez stated she was also interested. That same afternoon Hernandez approached Union President Bononcini around 3 p.m., and asked him if it were possible for clerical employees to have their own union. Bononcini said he believed that it was. He suggested that Hernandez talk to the people and see how many were interested in it and he would get back to her later on what could be done.

On June 19 Hernandez met with clerical employees Robin Williams, Cindy Carpenter, and Erma Gondra in the plant lunchroom where they discussed union representation. The other employees indicated that when Hernandez found out more detail about the Union they would be willing to talk to her more about it. It was not until June 20 that Bononcini again met with Hernandez and told her to see how many people were interested in the Union and he would then supply her with cards to sign people up for the Union.

2. Criticism of Hernandez' work

On June 19 Paskovich met with Hernandez in the office of Personnel Manager Judy Parker.[3] According to Hernandez, Paskovich told her there were going to be changes in the purchasing department and that Hernandez' duties were going to change a bit more, that she wanted Hernandez to stay in her office more than she had in the past, and that she wanted her personal calls to slow down. Paskovich further stated that she did not want Cindy Carpenter or Robin Williams coming into Hernandez' office and visiting with her because when they came in sometimes they would stay a couple of minutes to talk and Paskovich wanted that stopped. Paskovich asked Hernandez if she had enrolled in a typing course. Hernandez replied that she could not because they were not signing up classes until July 10, but Hernandez added that she had previously told Metzger that the classes would not be signed up until July 10 and he had told her that would be satisfactory. Hernandez inquired of Paskovich why she was talking to Hernandez in this manner instead of Metzger. Paskovich replied that she was Hernandez' supervisor. Hernandez complained that she had not been told Paskovich was her supervisor and stated that she would take the matter up with Metzger because as far as she was concerned Metzger was her supervisor. The discussion ended and, the following Monday morning in meeting with Metzger, Hernandez was told by Metzger that both he and Paskovich were her supervisors.

Hernandez testified that shortly before 5 p.m., on June 25, she was called into Larry Metzger's office where he told her that she was going to be terminated. She asked him why and he replied that it was because of her lack of typing skill. Hernandez protested that she had lined

[3] Hernandez originally testified that the meeting with Paskovich took place on the 17th but on cross-examination indicated that it was possible that it was June 19. Paskovich testified it was June 19. I conclude June 19 was the actual date.

up a class to learn to type and had previously informed him of it including the dates of the course and he had indicated that that would be alright. Metzger's reply was that they needed somebody to type a thousand words a minute "right now."

3. Argument and conclusions

The General Counsel contends that the asserted reason for Hernandez' discharge was pretextual and that the real reason for her discharge was Respondent's concern over her organizing the clerical employees. In support of this conclusion the General Counsel relies upon the timing of the discharge within a week after Hernandez initiated the inquiry of Bononcini about representation of the clericals, the failure of Respondent to give any warning to Hernandez regarding the discharge, and Respondent's toleration for several months of Hernandez' work deficiencies with regard to her typing of purchase orders, deficiencies which Respondent asserts were the main basis for the discharge. In further response to Hernandez' typing deficiencies the General Counsel observes that Hernandez, upon urging by Metzger, had arranged to enroll in a typing course on July 10 at the San Antonio Community College. Hernandez' testimony that Metzger had indicated his approval of that course of action was not contradicted. Moreover, in her testimony herein Paskovich had also related that Hernandez' enrollment in the typing course on July 10 would have been acceptable to her as a commitment by Hernandez to remedy her typing problems and meet Respondent's needs.

The General Counsel in further support of his contention regarding discrimination of Hernandez points to the testimony of Hernandez, uncontradicted in this regard, that she had asked Metzger in June for a raise and his response had been an expression of appreciation of the work she had been doing during a period between the resignation of the prior purchasing agent, Gilbert Ramirez, and the hiring of Paskovich and a commitment to see what he could do about getting her a raise. Hernandez' testimony that she had not been previously warned regarding any work deficiency other than her typing is also argued by the General Counsel to be supportive of the conclusion that Hernandez' discharge was unlawful.

Finally, the General Counsel argues that Respondent's failure to consider a replacement for Hernandez prior to the time of the discharge decision is also indicative of an ulterior motive in Hernandez' discharge. Respondent in this regard admits that Hernandez was replaced by a temporary employee who had no prior purchasing experience. And, while, as Respondent contends, the temporary employee had typing skills and passed a typing test, the General Counsel points out that by Metzger's own estimation typing constituted only about 20 percent of the purchasing clerk's work.

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), the Board held that the General Counsel in alleged unlawful discharge cases must first "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's [discharge] decision." Once the *prima facie* case is established the burden then shifts to the employer "to demonstrate the same action would have taken place even in the absence of protected conduct." *Id.* at 1089. Respondent contends that the General Counsel has failed in his burden of proof because he failed to prove employer knowledge of the union activity and union animus as a motive for the discharge. It is quite clear as Respondent points out that the General Counsel in unlawful discharge cases has the burden of proving employer knowledge of the union activity of the dischargee and union animus as a motive for the discharge. *Siltec Corporation*, 217 NLRB 282 (1975). On the other hand, there is Board and court precedent that knowledge and motive may be inferred from the record as a whole. *Patrick Plaza Dodge, Inc.*, 210 NLRB 870 (1974), enforcement denied in pertinent part 522 F.2d 804 (4th Cir. 1975); *Lapeer Metal Products Co.*, 134 NLRB 1518 (1961); *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959). And as said by the Ninth Circuit in *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 470 (1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. . . . If [the trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal. . . .

Considering the record as a whole and the evidence argued by the General Counsel in light of the principles cited above, I am persuaded that the General Counsel has established a *prima facie* violation of the Act with respect to the discharge of Hernandez. While it is true that there was no evidence of direct knowledge of any union activity on the part of Hernandez prior to her discharge Paskovich failed to specifically deny Hernandez' testimony that Hernandez had ascertained the possibility of union representation of the clerical employees and expressed her interest in the Union. Paskovich viewed this information as sufficiently important to relate it both to Metzger and Personnel Administrator Parker on the same day of Hernandez' discharge and prior to the actual discharge decision by General Manager Youngblood. While Youngblood personally may not have been aware of the information related by Paskovich to Metzger it is clear that he acted upon the recommendations of Paskovich and Metzger and to this extent any motive they may have had in making the recommendation must be imputed to Youngblood. The timing of the discharge in relation to Hernandez' expression of interest in the Union when coupled with the other elements of the case related above warrant an inference that the discharge was responsive to Hernandez union interest and provides the necessary union animus to establish the General Counsel's *prima facie* case. Accordingly, under *Wright Line, supra*. Respondent must show that its same actions would have taken place even in the absence of Hernandez' union interest.

In addition to its argument regarding the absence of evidence of knowledge of Hernandez' union activity and the absence of evidence of union animus Respondent

contends that it had ample reason to discharge Hernandez because of her failure to meet her job requirements including the necessity for fast and accurate typing. In this connection Youngblood testified that he learned in mid-April that the accounts payable clerk, Bobbie Byers, was typing the purchase orders. Youngblood found this unprofessional from an accounting standpoint because of the possibility of some impropriety flowing from the same clerk issuing purchase orders and also paying for the orders. Youngblood instructed Metzger to qualify the purchasing department employees in their work. It was at this point that Metzger testified that he told Hernandez she would have to learn to type so she could type the purchase orders.[4] In addition, Metzger testified without specific contradiction that it was necessary to hire a temporary employee beginning around April for a few weeks to perform the typing Byers had been doing.

Metzger testified he warned Hernandez at least four times about her typing and the necessity of improving it. He acknowledged that he had been told of the San Antonio Community College typing course either by Hernandez or Paskovich. He further acknowledged that he had not taken disciplinary action against Hernandez regarding her typing prior to her discharge. The record shows no other disciplinary action against Hernandez for work performance deficiencies. After Paskovich was hired Paskovich complained to him about Hernandez' work including her typing problems. Metzger related that he ultimately agreed with Paskovich that they had given Hernandez an adequate opportunity to improve her skills and since she had not done so they should terminate her. He failed to specify exactly when he agreed with Paskovich on Hernandez' termination.[5]

Contrary to Hernandez' testimony that she had not been chastised about her work Paskovich testified that she had talked to Hernandez several times about her typing prior to June 19. Paskovich acknowledged Hernandez' revelation in the June 19 meeting about the community college typing course beginning July 10. Moreover, Paskovich admitted that she told Hernandez that the enrollment in July would be all right. On the other hand, Paskovich testified that her meeting with Hernandez concluded with Paskovich giving Hernandez until Monday to tell Paskovich how Hernandez was going to "rectify the situation." Upon Hernandez' failure to report back to her the following Monday, June 22, Paskovich concluded that Hernandez should be discharged and communicated that decision to Metzger by noon of that day. She admittedly did not take the matter up with Hernandez again prior to Hernandez' discharge.

On rebuttal Hernandez denied that Paskovich had ever talked to her about her job prior to June 19. Moreover, she contradicted Paskovich's testimony regarding any request by Paskovich on June 19 to report back to her on the following Monday. She reported that Paskovich only asked if she had any comments or anything to say in her behalf with regards to what Paskovich had stated. Hernandez' response was that she did not have anything to say until she talked to Metzger. I find Hernandez' testimony with respect to the June 19 meeting with Paskovich more persuasive. I likewise credit Hernandez' assertion that Paskovich had not previously criticized her work. Had Paskovich made prior critical comments about Hernandez' work it is more probable that Hernandez would have questioned Paskovich's supervisor authority before June 19. In addition, Paskovich's testimony that she expected a response from Hernandez regarding the June 19 meeting is also suspect. If as Paskovich contends she had laid out her criticism of Hernandez' job on June 19 and had made suggestions with respect to Hernandez' job improvement, there would have been no further need for Hernandez to check back with Paskovich the following Monday. It is difficult to perceive how Hernandez could have satisfied Paskovich any further in reporting back. She had already indicated she would be enrolling in a typing course on July 10, and that course of action was directly responsive to what apparently was Respondent's biggest concern regarding Hernandez' work.

As previously noted the General Counsel's case is weak due to the absence of direct knowledge of any union activity by Hernandez. Additional weakness is found in Hernandez' general association with union officers and unit employees which had long been known to Respondent and clearly tolerated by it. However, it is abundantly clear that at the time of the discharge Hernandez had admittedly revealed to Paskovich, and through Paskovich to Metzger and Personnel Administrator Judy Parker, that clerical employees were subject to representation by the Union and that Hernandez was specifically interested in such representation. An immediate threat of further union organization was presented. Of course, this alone would not have been sufficient to preclude the effectuation of a legitimate discharge, for an employee cannot avoid warranted disciplinary action by simply advising an employer that the employee is involved in union activity. But what is most damaging to Respondent's case is the fact that nothing significant regarding Hernandez' work had occurred since June 19 when Paskovich critiqued Hernandez' job performance other than Hernandez' revelation of her interest in union representation. Certainly there was no further criticism of Hernandez' work between June 19 and her discharge. Hernandez had indicated on June 19 her intention to sign up for the typing course and that intention had met with Respondent's approval. And, as the General Counsel points out, the discharge decision was rather precipitous with no discussions of a replacement for Hernandez.

Considering all the foregoing, and the record as a whole, including the timing of the discharge on the same day of Hernandez' expression of interest through Pasko-

[4] Metzger testified that he first started talking to Hernandez regarding taking typing lessons in February. That testimony appears to conflict with Youngblood's since Youngblood specified mid-April as the time he told Metzger to qualify his people. Youngblood appeared to be more positive in his testimony and it also coincides with that of Hernandez. Accordingly, I credit Youngblood and Hernandez over Metzger on this point.

[5] Paskovich testified the decision regarding Hernandez' termination was reached with Metzger on Monday morning, June 22. This would put it before Paskovich claims Hernandez had related to Paskovich her interest in union representation. I do not credit Paskovich's testimony in this regard. It was not specifically corroborated by Metzger or by Parker to whom the decision was allegedly communicated on June 24.

vich of the Union's representation of the clerical employees, Hernandez' commitment to remedy Respondent's primary objection to her job performance by agreeing to enroll in a typing course, the unexplained failure of Respondent to consider a replacement for Hernandez prior to the effectuation of the discharge, the ultimate replacement of Hernandez with a typist not having purchasing clerk experience even though typing constituted only about 20 percent of the total worktime of the purchasing clerk, the absence of any clear-cut warning of discharge prior to effectuation of the discharge, and the absence of any additional criticism of Hernandez' job performance between June 19 and her discharge, lead me to the conclusion that Respondent has not rebutted the General Counsel's *prima facie* case. Accordingly, I conclude that the General Counsel has established by a preponderance of the evidence that Hernandez' discharge was responsive to Hernandez' expression of interest in representation of clerical employees by the Union, and that the discharge was, therefore, violative of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not unlawfully interrogate employees in violation of Section 8(a)(1) of the Act.
4. By discharging its employee Gloria Jean Hernandez for union considerations, thereby discouraging membership in the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed violations of Section 8(a)(3) and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Since I found that Respondent discriminatorily discharged Gloria Jean Hernandez it will be recommended that Respondent be ordered to offer her immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered from the time of her discharge to the date of Respondent's offer of reinstatement. The backpay for Hernandez is to be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6] Moreover, consistent with the Board's decision in *Sterling Sugars, Inc.*, 261 NLRB 472 (1982), I shall also recommend that Respondent be required to expunge from its records any reference to the unlawful discharge of Hernandez and to provide written notice of such expunction to Hernandez and inform her that Respondent's unlawful conduct will not be used as a basis for further personnel actions concerning her.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Sitco (Stainless Ice-Tainer Corporation), San Antonio, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Union of Electrical, Radio and Machine Workers Union, Local 1127, AFL-CIO-CLC, or any other labor organization, by discriminatorily discharging employees, or in any manner discriminating against them with regard to their hire and tenure of employment or terms or conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Offer Gloria Jean Hernandez immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges, and make her whole for any loss of earnings in the manner set forth in "The Remedy."

(b) Expunge from its files any reference to the discharge of Gloria Jean Hernandez on June 25, 1981, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its San Antonio, Texas, place of business copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and to carry out its provisions.

WE WILL NOT discourage membership in International Union of Electrical, Radio and Machine Workers Union, Local 1127, AFL-CIO-CLC, or any other labor organization, by discriminatorily discharging, or in any other manner discriminating against, employees with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Gloria Jean Hernandez immediate and full reinstatement to her former job or, if her former job no longer exists, to a substantially equivalent position of employment, without prejudice to her seniority or other rights and privileges, and WE WILL make her whole for any loss of pay that she may have suffered by reason of our discrimination against her, with interest.

WE WILL expunge from our files any references to the discharge of Gloria Jean Hernandez on June 25, 1981, and WE WILL notify her that this has been done and that evidence of this unlawful discharge will not be used a basis for future personnel actions against her.

SITCO (STAINLESS ICE-TAINER CORPORATION)